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Attorney for Defendant
CALIFORNIA LAND TITLE OF MARIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PATRICIA C. BARBERA,
Plaintiff,

vs.

WMC MORTGAGE CORPORATION, a
California corporation, et al., aka
WMCDirect; a California Business Entity;
GE Consumer Finance, a unit of General
Electric Company; Select Portfolio
Servicing Corp, a Utah Corporation;
Fairbanks Holding Corporation, a
Delaware Corporation; And Land Title
Company of Marin, a California Business
Entity; Does 1 thru 100, inclusive,

Defendants.

Case No.: Case No. 4:08-cv-02677-SBA
(prior related case number
3:08-cv-2677-PJH)

MOTION TO DISMISS PLAINTIFF
PATRICIA C. BARBERA'S
COMPLAINT AND MEMORANDUM
OF POINTS AND AUTHORITIES BY
DEFENDANT CALIFORNIA LAND
TITLE OF MARIN
[REQUEST FOR JUDICIAL NOTICE
FILED CONCURRENTLY HEREWITH]

Date: July 29, 2008
Time: 1:00 p.m.
Court: Hon. Sandra B. Armstrong

1 2. Are BARBERA’S claims barred by the statute of limitations?

2 3. Is the Complaint barred under the doctrines of *res judicata* and/or
3 collateral estoppel?

4 **B. STATEMENT OF FACTS, PROCEDURAL HISTORY, AND**
5 **ARGUMENT**

6 On July 23, 2004, BARBERA filed a complaint in the Superior Court of
7 California, County of San Francisco, in which CAL LAND was one of the defendants. (See
8 Exhibit “A” to Request for Judicial Notice). On September 3, 2004, the case was removed to
9 this Court, given case number C-04-3728 and assigned to the Honorable Sandra B.
10 Armstrong. (See Exhibit “B” to Request for Judicial Notice). On March 15, 2005,
11 BARBERA filed a first amended complaint in this Court. (See Exhibit “C” to Request for
12 Judicial Notice).

13 Thereafter, on April 26, 2005, in response to BARBERA’S motion to file a second
14 amended complaint, CAL LAND filed an opposition to that motion. (See Exhibit “D” to
15 Request for Judicial Notice).

16 On May 26, 2005, this Court made an order regarding the motion to file a second
17 amended complaint and struck those portions of the first amended complaint that added
18 allegations against CAL LAND and ordered BARBARA to file a second amended complaint
19 removing the allegations as to CAL LAND. (See Exhibit “E” to Request for Judicial Notice).

20 In the May 26, 2005 Order, on page 5, lines 12 through 16, the Court stated as follows:

21 The FAC adds Cal Land as a named defendant to the Third Cause of
22 Action for violation of the Truth in Lending Act (“TILA”), Home
23 Ownership and Equity Protection Act (“HOEPA”), and Regulation Z, and
24 adds two additional causes of action against Cal Land for breach of
25 fiduciary duty and negligence. In each of the three causes of action,
 plaintiff asserts that Cal Land failed to provide to her a mandated written

1 three-day right to cancel notice and failed to provide “accurate
2 disclosures.”

3 Then after reciting an analysis that no viable claim could be asserted against CAL
4 LAND, the Court determined on page 7 line 15 through page 8 line 22 of Exhibit “E” that the
5 claims against CAL LAND were time barred. The Court then concluded on page 9 “[F]or the
6 foregoing reasons, the Court strikes those portions of the FAC that add allegations
7 against...Cal Land, and denies Plaintiff’s Motion for Leave to Amend the FAC.”

8 In a later order filed January 19, 2006 on a motion to dismiss filed by defendants
9 WMC Mortgage Corp., WMC Finance Co., and WMCDirect, the Court confirmed on page 5,
10 lines 13 through 16, that the portions of the first amended complaint that added allegations
11 against Cal Land were stricken. (See Exhibit “F” to Request for Judicial Notice.)

12 Despite this Court’s prior Orders, on April 11, 2008, BARBERA filed a new action in
13 the Superior Court of California, County of Marin, containing virtually the same claims
14 against CAL LAND as in the prior action. The Marin County action was removed to this
15 Court on May 28, 2008. On June 11, 2008, prior to filing this motion, counsel for CAL
16 LAND sent a meet and confer letter to BARBERA by both email and regular mail requesting
17 that BARBERA voluntarily stipulate dismissing the case. No response was received.
18

19 The new Complaint names CAL LAND in the First Cause of Action (specific
20 performance), Fourth Cause of Action (failure to provide mandatory three-day notice of
21 rescission and understated disclosures), and Thirteenth Cause of Action (breach of fiduciary
22 duty). The Second Cause of Action (quiet title), Seventh Cause of Action (misrepresentation
23 and inducement), Fourteenth Cause of Action (negligence-emotion distress), and Fifteenth
24 Cause of Action (unclean hands) are not labeled as to who they are against. The Fourteenth
25

1 Cause of Action does contain allegations against CAL LAND in the body of the cause of
2 action. Neither the Second nor the Fifteenth Causes of Action contain any charging
3 allegations. But even if these causes of action as well as the Seventh Cause of Action that do
4 not specifically name CAL LAND are meant to include it, they are barred.

5
6 As in the prior complaint, the First, Fourth, Thirteenth, and Fourteenth Causes of
7 Action claim damages resulting from alleged violation of the TILA, Regulation Z, and
8 HOEPA. The Thirteenth Cause of Action also claims damages for an alleged breach of
9 fiduciary duty and the Fourteenth Cause of Action for alleged escrow negligence. The
10 Fourth, Thirteenth, and Fourteenth Causes of Action allege that the wrongful conduct by CAL
11 LAND consisted of concealing and failing to provide or disclose to BARBERA a three-day
12 right to cancel notice and to provide accurate disclosures as mandated by TILA, Regulation Z,
13 and HOEPA, allegations virtually identical to those in the prior complaint.

14
15 Although this Court has previously ruled that no viable cause of action can be stated
16 against CAL LAND and that any potential claim is time barred, CAL LAND resubmits the
17 following authority and adds the doctrines of *res judicata* and collateral estoppel.

18 **1. BARBERA Fails to State Facts Sufficient to Constitute a Claim Against**
19 **CAL LAND**

20 **a. The Duty of an Escrow Agent**

21 Admittedly, an escrow holder is an agent and fiduciary of the parties to the escrow.
22 But, the agency created by the escrow is limited to the obligation of the escrow holder to carry
23 out the instructions of each of the parties to the escrow. *Vournas v. Fidelity Nat. Tit. Ins. Co.*,
24 73 Cal. App. 4th 668, 674 (1999). In defining the scope of the escrow's fiduciary duties, the
25 general principle is that the escrow holder must comply strictly with the instructions of the
parties. *Amen v. Merced County Title Co.*, 58 Cal. 2d 528, 534 (1962).

Beyond the faithful compliance by the escrow with its principals' instructions, the escrow holder has no general duty to police the affairs of its principals. *Claussen v. First American Title Guaranty Co.*, 186 Cal. App. 3d 429, 435-436 (1986). Stated another way, absent clear evidence of fraud, an escrow's obligations are limited to compliance with the parties' instructions. *Lee v. Title Ins. & Trust Co.*, 264 Cal. App. 2d 160, 162 (1968).

The escrow owes no general duty of disclosure to its principal(s). *Cunningham v. Security Title Ins. Co.*, 241 Cal.App.2d 626, 630-631 (1966). The escrow has no obligation to provide advice regarding the business propriety of the transaction. *Axley v. Transamerica Title Ins. Co.*, 88 Cal.App.3d 1, 9-10 (1978). The provisions of the TILA, Regulation Z or HOEPA do not enlarge or modify the basic duties of the escrow holder.

b. BARBERA Fails to Allege Facts to Establish Any Legal Duty of CAL LAND Pursuant to TILA, Regulation Z and HOEPA

In the current Complaint, in paragraph 18, BARBERA alleges that escrow closed on June 11, 1997. She makes no allegations of wrongful or participatory conduct by CAL LAND from and after this date. She makes no allegations that CAL LAND violated oral or written instructions provided by BARBERA during the course of the escrow. She makes no allegations that CAL LAND violated any law or regulation that imposes specific duties upon an escrow holder. She makes no specific factual allegations of concerted activity with the other Defendants. A general allegation of concerted action has no pleading value or legal consequence. If a plaintiff elects to sue on the theory of conspiracy, the complaint should allege (a) the formation and operation of the conspiracy, (b) the wrongful act(s) of any of the conspirators pursuant to the conspiracy and (c) the resulting damage. *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 488 (1941); *Sales Corp. v. Olsen*, 80 Cal.App.3d 645, 649 (1978).

1 The Complaint also fails to allege facts to establish any legal duty of an escrow pursuant to
 2 TILA, Regulation Z or HOEPA, assuming such a legal duty might exist.

3 Plaintiff's pleadings falsely imply that the TILA, Regulation Z and HOEPA are
 4 independent of each other. In fact, Regulation Z and HOEPA are integrated with the TILA,
 5 which provides the enforcement standard and penalty parameters for violation. CAL LAND
 6 cannot be legally liable under the TILA, Regulation Z or HOEPA since CAL LAND is not a
 7 "creditor" under the TILA or HOEPA [see 15 U.S.C. §1602(f)] or a "business which offers or
 8 extends credit" under Regulation Z [see 12 CFR §226.1(c)]. Stated another way, the TILA
 9 and HOEPA impose legal liability only upon "creditors" or "lessors" as defined therein, and
 10 Regulation Z only applies to individuals or businesses that offer or extend credit under the
 11 four conditions described in 12 CFR §226.1(c). BARBERA has failed to state facts sufficient
 12 to constitute a claim against CAL LAND under the TILA, Regulation Z or HOEPA. Because
 13 these allegations have no merit, the complaint should be ordered dismissed.

14
 15 **c. The Statute of Limitations Bars BARBERA'S Claims Against CAL LAND.**

16 Under California law, the statute of limitations for escrow liability may range from
 17 two to four years, depending upon the theory of recovery. For an action based upon an
 18 alleged breach of oral instructions, the statute of limitations is two years pursuant to
 19 California Code of Civil Procedure section 339. The statute of limitations for breach of
 20 fiduciary duty is either three or four years as the result of conflicting case law. See California
 21 Code of Civil Procedure § 338(b) (utilizing three years); *Kruse v. Miller*, 143 Cal. App. 2d
 22 656, 660 (1956) (utilizing three years); *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1210
 23 (9th Cir. 1970) (utilizing three years); *Stallberg v. Western Title Ins. Co.*, 230 Cal. App. 3d
 24 1223, 1230 (1991) (utilizing four years and applying California Code of Civil Procedure §
 25

1 343). For breach of a written escrow instruction, the statute of limitations is four years. *Amen*
 2 *v. Merced Co. Title Co.*, 58 Cal. 2d 528, 534 (1962).

3 BARBERA’S claims against CAL LAND are based on incidents that took place on
 4 June 12, 1997—over seven years before she filed the original Complaint on July 23, 2004 and
 5 almost eleven years after she filed the new Complaint on April 11, 2008—and such claims are
 6 barred by the statute of limitations, absent a detailed factual pleading of facts that would
 7 invoke the delayed discovery rule. *Prudential Home Mortgage Co. v. Superior Court*, 66
 8 Cal.App. 4th 1236, 1246-1247; *McKelvey v. Boeing North American, Inc.*, 74 Cal.App. 4th
 9 151, 160-161. The complaint lacks the required specificity and essential substance and fails
 10 to allege facts to support delayed discovery in the prior Complaint and has not and cannot do
 11 so in the new Complaint.

12 In fact, on page 2 of the new Complaint, line 21, BARBERA states “[S]he has endured
 13 the hardship for seven years, as a result of this flagrant conduct.” This statement does not
 14 support delayed discovery but rather is an admission that what she complains of has been
 15 going on for a substantial period of time and she knew it. In addition, the new Complaint
 16 alleges conduct occurring not only in 1997 when escrow closed, but also during the time
 17 period 1998 through 2000 as alleged in paragraphs 24-34. There is thus no effort to allege
 18 facts to invoke the delayed discovery rule for the simple reason that none can be alleged. If
 19 such facts could not be alleged in 2004, they certainly cannot be alleged in 2008.
 20 BARBERA’S claims against CAL LAND are thus also barred by the statute of limitations.

21 **2. This Court’s Prior Order Bars BARBERA’S Claims Under the Doctrines**
 22 **of *Res Judicata* and/or Collateral Estoppel.**

23 The preclusive effect of a prior federal court judgment is determined under federal
 24 law. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 149 L. Ed. 2d 32, 43,
 25 121 S. Ct. 1021, 1028 (2001); see also *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir.

1 1988); *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). Under
2 federal law, *res judicata* consists of two preclusion concepts -- claim preclusion and issue
3 preclusion. *Miagra v. Warren City School Dist. Board of Ed.*, 465 U.S. 75, 77 n.1, 104 S. Ct.
4 892, 894 n. 1, 79 L. Ed 2d 56, 59 n.1 (1984).

5
6 “*Res judicata*, or claim preclusion, prevents the relitigation of a claim previously tried
7 and decided.” *Clark v. Bear Sterns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). It
8 operates to bar a lawsuit when an earlier suit (1) involved the same claim or cause of action,
9 (2) reached a final judgment on the merits and (3) involved the same parties or their privities.
10 *Mypoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985 (9th Cir. 2005); *Sidhu v. Flecto Co.*, 279
11 F.3d 896, 900 (9th Cir. 2002). Claim Preclusion bars all grounds for recovery, whether or not
12 they were actually asserted in the previous lawsuit. *Clark v. Bear Sterns & Co., Inc., supra*,
13 966 F.2d at 1320; *In re Int’l. Nutronics, Inc. v. Robertson*, 28 F.3d 965, 969 (9th Cir. 1994).

14
15
16 “Collateral estoppel, or issue preclusion, bars the relitigation of issues actually
17 adjudicated in a previous litigation between the same parties.” *Clark v. Bear Sterns & Co.,*
18 *Inc., supra*, 966 F.2d at 1320; see also *Robi v. Five Platters, Inc., supra*, 838 F.2d at 322 (9th
19 Cir. 1988). Issue preclusion prevents the re-litigation of an issue (1) identical to the one
20 alleged in the prior litigation; (2) actually litigated in the prior litigation; and (3) actually
21 determined as a critical and necessary part of the judgment in the earlier action.” *Clark v.*
22 *Bear Sterns & Co., Inc., supra*, 966 F.2d at 1322.

23
24 Although there was no judgment in the prior action, this Court’s prior Order expressly
25 determined that no viable claim could be asserted against CAL LAND which in effect is the

1 equivalent of a judgment. Either doctrine thus operates as a complete bar to BARBERA'S
2 new suit, and, thus both doctrines bar BARBERA'S claims.

3 4 CONCLUSION

5 As to CAL LAND, the new Complaint is a sham as was the prior one. Here, as in the
6 prior case, the only factual basis for the claimed liability is the alleged failure to provide a
7 three-day notice to cancel and violation of the TILA, Regulation Z and/or HOEPA. As noted
8 above, and as previously found by this Court in the prior action, these statutes and regulations
9 impose no duties or liability upon CAL LAND in its capacity as an escrow service provider.
10 Also, no violation of an escrow instruction is alleged. In addition to these fundamental flaws,
11 all alleged claims against CAL LAND were time-barred in 2004 and remain time-barred now.
12 The Court's prior Order also bars BARBERA'S claims based on the doctrines of *res judicata*
13 and/or collateral estoppel. For the foregoing reasons, CAL LAND respectfully requests that
14 this motion be granted and the case ordered dismissed as a matter of fact and law.
15

16
17 Dated: June 19, 2008

18 /s/ Daniel A. Gamer

19 Daniel A. Gamer
20 Attorney for Defendant
21 California Land Title of Marin

22 I, Daniel A. Gamer, am the ECF User whose ID and password are being used to file
23 this Motion to Dismiss Plaintiff Patricia C. Barbera's Complaint and Memorandum of Points
24 and Authorities by Defendant California Land Title of Marin.

25 /s/ Daniel A. Gamer

Daniel A. Gamer

PROOF OF SERVICE

I am employed in the County of Marin, State of California. I am over the age of 18 and not a party to the within action. My business address is 55 Professional Center Parkway, San Rafael, California 94903.

On June 19, 2008, I served the foregoing documents described as

Motion to Dismiss Plaintiff Patricia C. Barbera's Complaint and Memorandum of Points and Authorities by Defendant California Land Title Of Marin

Request For Judicial Notice by Defendant California Land Title of Marin in Support of Motion to Dismiss Plaintiff Patricia C. Barbera's Complaint

[Proposed] Order Granting Defendant California Land Title of Marin's Motion to Dismiss Plaintiff Patricia C. Barbera's Complaint

on the parties in this action by

() By facsimile transmission. The telephone number of the sending facsimile machine was (415) 472-3940. The telephone number of the receiving facsimile machine(s) was as indicated below. A transmission report was properly issued by the sending facsimile machine, and the transmission was reported as complete and without error.

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Rafael, California, addressed as follows:

Patricia C. Barbera
24 Caribe Isle
Novato, CA 94949
Telephone: (415) 382-9617
Facsimile: (415) 382-0756

In Pro Per

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Donna Meyers
Donna Meyers

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Attorney for Defendant
CALIFORNIA LAND TITLE OF MARIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PATRICIA C. BARBERA,
Plaintiff,

vs.

WMC MORTGAGE CORPORATION, a
California corporation, et al., aka
WMCDirect; a California Business Entity;
GE Consumer Finance, a unit of General
Electric Company; Select Portfolio
Servicing Corp, a Utah Corporation;
Fairbanks Holding Corporation, a
Delaware Corporation; And Land Title
Company of Marin, a California Business
Entity; Does 1 thru 100, inclusive,

Defendants.

Case No.: Case No. 4:08-cv-02677-SBA
(prior related case number
3:08-cv-2677-PJH)

REQUEST FOR JUDICIAL NOTICE BY
DEFENDANT CALIFORNIA LAND
TITLE OF MARIN IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF
PATRICIAL C. BARBERA'S
COMPLAINT

[MOTION TO DISMISS AND
MEMORANDUM OF POINTS AND
AUTHORITIES FILED
CONCURRENTLY HEREWITH]

Date: July 29, 2008
Time: 1:00 p.m.
Court: Hon. Sandra B. Armstrong

Pursuant to Federal Evidence Code Section 201, CALIFORNIA LAND TITLE OF MARIN ("CAL LAND") sued herein as CALIFORNIA LAND TITLE COMPANY OF MARIN, hereby requests that this Court take judicial notice of the following documents in support of its Motion to Dismiss, copies of which are attached hereto as exhibits:

<u>Exhibit</u>	<u>Description</u>
A	On July 23, 2004, plaintiff filed a complaint in the Superior Court of California, County of San Francisco. One of the defendants was CAL LAND. A true and correct copy of the complaint is attached hereto as Exhibit "A."
B	On September 3, 2004, WMC Mortgage Corp., WMC Finance Co., Apollo Management L.P., WMCDirect, and GE Consumer Finance removed the San Francisco Superior Court action to the Northern District of California, San Francisco Division. A true and correct copy of the 2004 Notice of Removal is attached hereto as Exhibit "B."
C.	On March 15, 2005, plaintiff filed a First Amended Complaint. A true and correct copy of the First Amended Complaint is attached hereto as Exhibit "C."
D.	On April 26, 2005, California Land Title of Marin filed an Opposition to Plaintiff's Motion to File a Second Amended Complaint. A true and correct copy of the Opposition is attached hereto as Exhibit "D."
E.	On May 26, 2005, the Honorable Judge Sandra Brown Armstrong of the Northern District of California, San Francisco Division, made an order regarding the motion to file a second amended complaint and struck those portions of the first amended complaint that added allegations against California Land Title of Marin and ordered Plaintiff to file a second amended complaint that removed the stricken allegations. A true and correct copy of that Order is attached hereto as Exhibit "E."
F.	On January 19, 2006, the Honorable Judge Sandra Brown Armstrong of the Northern District of California, San Francisco Division, dismissed, with prejudice, all of Plaintiff's federal causes of action against WMC Mortgage. A true and correct copy of that Order is attached hereto as Exhibit "F."

1 June 19, 2008.

/s/ Daniel A. Gamer

Daniel A. Gamer

2 Attorney for Defendant

3 California Land Title of Marin

4
5
6 I, Daniel A. Gamer, am the ECF User whose ID and password are being used to file
7 this Request for Judicial Notice in Support of Motion to Dismiss Plaintiff Patricia C.
8 Barbera's Complaint.

9 /s/ Daniel A. Gamer

Daniel A. Gamer

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Attorney for Defendant
CALIFORNIA LAND TITLE OF MARIN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PATRICIA C. BARBERA,
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Defendants.

Case No.: Case No. 4:08-cv-02677-SBA
(prior related case number
3:08-cv-2677-PJH)

NOTICE REGARDING EXHIBIT
ATTACHMENT TO REQUEST FOR
JUDICIAL NOTICE BY DEFENDANT
CALIFORNIA LAND TITLE OF MARIN
IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF PATRICIA C. BARBERA'S
COMPLAINT

Date: July 29, 2008
Time: 1:00 p.m.
Court: Hon. Sandra B. Armstrong

The following Exhibits, which are attachments to the Request for Judicial Notice is in paper form only and is being maintained in the case file in the Clerk's Office.

A On July 23, 2004, plaintiff filed a complaint in the Superior Court of California, County of San Francisco. One of the defendants was CAL LAND.

1 B On September 3, 2004, WMC Mortgage Corp., WMC Finance Co.,
2 Apollo Management L.P., WMCDirect, and GE Consumer Finance
3 removed the San Francisco Superior Court action to the Northern
District of California, San Francisco Division.

4 C. On March 15, 2005, plaintiff filed a First Amended Complaint.

5 D. On April 26, 2005, California Land Title of Marin filed an Opposition
6 to Plaintiff's Motion to File a Second Amended Complaint.

7 E. On May 26, 2005, the Honorable Judge Sandra Brown Armstrong of
8 the Northern District of California, San Francisco Division, made an
9 order regarding the motion to file a second amended complaint and
10 struck those portions of the first amended complaint that added
allegations against California Land Title of Marin and ordered Plaintiff
to file a second amended complaint that removed the stricken
allegations.

11 F. On January 19, 2006, the Honorable Judge Sandra Brown Armstrong
12 of the Northern District of California, San Francisco Division,
13 dismissed, with prejudice, all of Plaintiff's federal causes of action
against WMC Mortgage.

14
15 The reason for manual filing is the voluminous nature of the Exhibits and the Exhibits
16 are available through PACER in Case No. C-04-3738 SBA.

17 Dated: June 19, 2008

18 /s/ Daniel A. Gamer
19 Daniel A. Gamer
20 Attorney for Defendant
California Land Title of Marin

21
22 I, Daniel A. Gamer, am the ECF User whose ID and password are being used to file
this Notice Regarding Exhibit Attachment by Defendant California Land Title of Marin.

23
24 /s/ Daniel A. Gamer
Daniel A. Game

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Attorney for Defendant
CALIFORNIA LAND TITLE OF MARIN

UNITED STATES DISTRICT COURT
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Case No.: Case No. 4:08-cv-02677-SBA
(prior related case number
3:08-cv-2677-PJH)

[PROPOSED] ORDER GRANTING
DEFENDANT CALIFORNIA LAND
TITLE OF MARIN'S MOTION TO
DISMISS PLAINTIFF PATRICIAL C.
BARBERA'S COMPLAINT

Date: July 29, 2008
Time: 1:00 p.m.
Court: Hon. Sandra B. Armstrong

1 Defendant CALIFORNIA LAND TITLE OF MARIN'S Motion to Dismiss Plaintiff
2 PATRICIA C. BARBERA'S Complaint came on for hearing before this Court. Having
3 carefully considered the briefs and arguments of counsel, and all other matters presented to
4 the Court, the Court HEREBY GRANTS CALIFORNIA LAND TITLE OF MARIN'S
5 Motion to Dismiss with prejudice.
6

7 BACKGROUND

8 On May 28, 2008, this action was removed from Marin County Superior Court.
9 Plaintiff filed the instant lawsuit alleging improper conduct by CALIFORNIA LAND TITLE
10 OF MARIN ("CAL LAND") in the handling of an escrow that closed in June, 1997.
11 BARBERA was a party to the escrow.

12 In 2004, Plaintiff BARBERA filed an action in the San Francisco Superior Court
13 which was removed from that court on September 3, 2004 and given case number C 04-3738.
14 The Court has been requested to and takes judicial notice of that action. The first amended
15 complaint later filed in that action alleged improper conduct by CAL LAND in handling the
16 same escrow as in the current case. The allegations in both the prior action and this action
17 allege violation of the Truth in Lending Act ("TILA"), Home Ownership and Equity
18 Protection Act ("HOEPA"), and Regulation Z, as well as claimed breach of fiduciary duty and
19 negligence for the alleged failure of CAL LAND to provide or disclose to BARBERA a three-
20 day right to cancel notice.

21 On May 26, 2005, this Court made an order in the prior action regarding
22 BARBERA'S motion to file a second amended complaint and struck those portions of the
23 first amended complaint that added allegations against CAL LAND. The Court has also been
24 requested to and takes judicial notice of the first amended complaint in the prior action and
25 the Court's May 26, 2005 order. In its motion to dismiss, CAL LAND asserts that the facts
alleged by BARBERA in the new action are insufficient to state a claim against CAL LAND

1 upon which relief can be granted and no claim can be stated since no violation of an escrow
2 instruction occurred and that any claims against CAL LAND are barred by the statute of
3 limitations. CAL LAND also asserts that the complaint is barred under the doctrines of *res*
4 *judicata* and/or collateral estoppel based on this Court's order in the prior action.

5 **I. Motion to Dismiss**

6 **A. Legal Standard**

7
8 A motion to dismiss is authorized under Federal Rules of Civil Procedure 12(b). A
9 rule 12(b) motion under subsection 6 is based upon the failure to state a claim upon which
10 relief may be granted.

11 **B. Analysis**

12 **1. The Complaint**

13 The Complaint names CAL LAND in the First Cause of Action (specific
14 performance), Fourth Cause of Action (failure to provide mandatory three-day notice of
15 rescission and understated disclosures), and Thirteenth Cause of Action (breach of fiduciary
16 duty). The Second Cause of Action (quiet title), Seventh Cause of Action (misrepresentation
17 and inducement), Fourteenth Cause of Action (negligence-emotional distress), and Fifteenth
18 Cause of Action (unclean hands) are not labeled as to who they are against although the
19 Fourteenth Cause of Action does contain allegations against CAL LAND in the body of the
20 cause of action. Neither the Second nor the Fifteenth Causes of Action contain any charging
21 allegations. But even if these causes of action as well as the Seventh Cause of Action that do
22 not specifically name CAL LAND are meant to include it, they are still subject to CAL
23 LAND'S Motion to Dismiss.
24
25

1 As in the prior complaint, the First, Fourth, Thirteenth, and Fourteenth Causes of
 2 Action claim damages resulting from alleged violation of the Truth in Lending Act (TILA),
 3 Regulation Z, and the Home Ownership and Equity Protection Act (HOEPA). The Thirteenth
 4 Cause of Action also claims damages for an alleged breach of fiduciary duty and the
 5 Fourteenth Cause of Action alleges escrow negligence. The Fourth, Thirteenth, and
 6 Fourteenth Causes of Action allege that the wrongful conduct by CAL LAND consisted of
 7 concealing and failing to provide or disclose to BARBERA a three-day right to cancel notice
 8 and to provide accurate disclosures as mandated by TILA, Regulation Z, and HOEPA,
 9 allegations virtually identical to those in the prior complaint.

10 **2. BARBERA Fails to State Facts Sufficient to Constitute a Claim Against CAL** 11 **LAND**

12 CAL LAND asserts that the complaint is improper since an escrow holder cannot be
 13 liable for violation of the provisions of the TILA, HOEPA, and Regulation Z that Plaintiff
 14 relies upon. CAL LAND also asserts that although it owes a fiduciary duty to the parties
 15 involved in an escrow, such duties are limited.

16 An escrow holder, as a dual agent of the parties to the escrow, owes duties to the
 17 parties to the escrow. However, those duties are limited. [] The primary duty
 18 owed by an escrow holder is to strictly and faithfully perform the instructions
 19 given to it by the parties to the escrow.

20 *Vournas v. Fidelity Nat. Tit. Ins. Co.*, 73 Cal. App. 4th 668, 674 (1999). “ An escrow
 21 holder has no general duty to police the affairs of its depositors, however. [] An escrow
 22 holder’s agency is limited to faithful compliance with instructions.” *Claussen v. First*
 23 *American Title Guaranty Co.*, 186 Cal. App. 3d 429, 435-436 (1986).

24 In her complaint in the First Fourth, Thirteenth, and Fourteenth causes of action,
 25 Plaintiff alleges violations of TILA, HOEPA, and Regulation Z by CAL L AND. First,

1 these provisions apply to creditors or those who “offer and extend credit,” not to escrow
 2 holders. 15 U.S.C. §1635(a), the provision of TILA that Plaintiff relies upon, states
 3 that:

4 Disclosure of obligor’s right to rescind. Except as otherwise provided in
 5 this section, in the case of any consumer credit transaction (including
 6 opening or increasing the credit limit for a open end credit plan) in which
 7 a security interest, including any such interest arising by operation of law,
 8 is or will be retained or acquired in any property which is used as the
 9 principal dwelling of the person to whom credit is extended, the obligor
 10 shall have the right to rescind the transaction until midnight of the third
 11 business day following the consummation of the transaction or the
 12 delivery of the information and rescission forms required under this
 13 section together with a statement containing the material disclosures
 14 required under this title [15 USCS §§ 1601 et seq.], whichever is later, by
 notifying the creditor, in accordance with regulations of the Board, of his
 intention to do so. ***The creditor shall clearly and conspicuously disclose,***
 in accordance with regulations of the Board, to any obligor in a
 transaction subject to this section the rights of the obligor under this
 section. ***The creditor shall also provide, in accordance with regulations***
of the Board, appropriate forms for the obligor to exercise his right to
rescind any transaction subject to this section.

15 15 U.S.C. § 1635(a) (emphasis added). 15 U.S.C. § 1639, the provision of HOEPA that
 16 Plaintiff relies upon, states:

17 Specific disclosures. In addition to other disclosures required under this
 18 title [15 USCS §§ 1601 et seq.], for each mortgage referred to in section
 19 103(aa) [15 USCS § 1602(aa)], ***the creditor shall provide the following***
disclosures in conspicuous type size...

20 15 U.S.C. § 1639(a)(1) (emphasis added.) Finally, Regulation Z requires a “business
 21 which offers or extends credit” to make certain disclosures:

22 Purpose. The purpose of this regulation is to promote the informed use of
 23 consumer credit by requiring disclosures about its terms and cost. The
 24 regulation also gives consumers the right to cancel certain credit
 25 transactions that involve a lien on a consumer’s principal dwelling,
 regulates certain credit card practices, and provides a means for fair and
 timely resolution of credit billing disputes. The regulation does not
 govern charges for consumer credit The regulation requires a maximum

1 interest rate to be stated in variable-rate contracts secured by the
2 consumer's dwelling. It also imposes limitations on home equity plans
3 that are subject to the requirements of § 226.5b and mortgages that are
4 subject to the requirements of § 226.32. The regulation prohibits certain
acts or practices in connection with credit secured by a consumer's
principal dwelling.

5 (c) Coverage. (1) In general, ***this regulation applies to each individual or***
6 ***business that offers or extends credit*** when four conditions are met: (1)
7 The credit is offered or extended to consumers; (ii) the offering or
8 extension of credit is done regularly; n1 (iii) the credit is subject to a
finance charge or is payable by a written agreement in more than 4
installments; and (iv) the credit is primarily for personal, family, or
household purposes.

9
10 12 C.F.R. § 226.1(b)&(c) (emphasis added). CAL LAND specifically identifies these
11 provisions and their inapplicability to CAL LAND, Plaintiff makes no attempt in Reply to
12 respond to CAL LAND'S argument that these provisions do not apply to an escrow holder.
13 Instead, she states that CAL LAND was acting as a fiduciary of WMC and therefore that it
14 should have delivered certain documents to Plaintiff. However, the Complaint fails to allege
15 that CAL LAND breached any fiduciary duty it owed to Plaintiff. It does not allege that
16 WMC provided these documents to CAL LAND and instructed CAL LAND to deliver the
17 documents, or any other "disclosures," to Plaintiff. Thus, Plaintiff's complaint against CAL
18 LAND must fail because: (1) TILA, HOEPA, and Regulation Z do not apply to an escrow
19 holder; and (2) the duties of the escrow are limited to faithfully carrying out the instructions
20 of the principals and there are no allegations that CAL LAND was instructed by WMC to
21 provide any documents or to make any disclosures to Plaintiff or that any escrow instruction
22 was violated. The Second, Seventh, and Fifteenth Causes of Action contain no charging
23 allegations against CAL LAND.

1 **3. Statute of Limitations**

2 CAL LAND also asserts that all of Plaintiff's claims are barred by the statute of
3 limitations. Under California law, the statute of limitations for escrow liability ranges from
4 two to four years, depending on the theory of recovery. For an action based on a breach of
5 oral instructions, the statute of limitations is two years. Cal. Code Civ. Proc. § 339. For
6 breach of a written escrow instruction, the statute of limitations is four years. *Amen v. Merced*
7 *Title County Title Co.*, 58 Cal.2d 528, 534 (1962). "The statute of limitations for breach of
8 fiduciary duty is four years." *Stallberg v. Western Title Ins. Co.*, 230 Cal.App.3d 1223, 1230
9 (1991) (citing California Civil Code § 343).

10
11 Here, the alleged conduct by CAL LAND occurred in June 1997. Plaintiff's
12 Complaint was filed on April 11, 2008, nearly eleven years after the relevant conduct
13 occurred. The prior complaint was filed on March 15, 2005, nearly eight years after the
14 relevant conduct occurred. This Court ordered all allegations against CAL LAND to be
15 stricken. Plaintiff's claims of late discovery ere rejected in the prior action are again rejected.

16
17 "[T]he doctrine of delayed discovery requires a plaintiff to plead facts showing an
18 excuse for late discovery of the facts underlying his cause of action. He must show that [he]
19 was not at fault for failing to discover it or had no actual or presumptive knowledge of facts
20 sufficient to put him on inquiry." *Prudential Home Mortgage Co. v. Superior Court*, 66
21 Cal.App.4th 1236, 1247 (1998) (internal quotation omitted). Here, Plaintiff fails to plead such
22 facts. As a preliminary matter, the factual predicate for CAL LAND'S failure to provide her
23 with certain documents should have been known to her in 1997 without the need for discovery
24 – she should have known what she did or did not receive in June 1997 well before filing the
25 prior complaint. Moreover, Plaintiff fails to make clear what facts were discovered by her

1 that made her aware of her claims against CAL LAND. Also, as discussed, *supra*, there are
 2 no factual allegations suggesting that CAL LAND breached any duty to provide Plaintiff with
 3 the right to rescind notice. Accordingly, any claims against CAL LAND are time barred.

4 **4. Res Judicata and/or Collateral Estoppel.**

5 In addition to the failure to state a claim against CAL LAND upon which relief can be
 6 granted and the bar of the statute of limitations in the current complaint, this Court has already
 7 ruled that Plaintiff BARBERA has no viable claims against CAL LAND.
 8

9 The preclusive effect of a prior federal court judgment is determined under federal
 10 law. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 149 L. Ed. 2d 32, 43,
 11 121 S. Ct. 1021, 1028 (2001); see also *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir.
 12 1988); *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). Under
 13 federal law, *res judicata* consists of two preclusion concepts -- claim preclusion and issue
 14 preclusion. *Miagra v. Warren City School Dist. Board of Ed.*, 465 U.S. 75, 77 n.1, 104 S. Ct.
 15 892, 894 n. 1, 79 L. Ed 2d 56, 59 n.1 (1984).
 16

17
 18 “*Res judicata*, or claim preclusion, prevents the relitigation of a claim previously tried
 19 and decided.” *Clark v. Bear Sterns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). It
 20 operates to bar a lawsuit when an earlier suit (1) involved the same claim or cause of action,
 21 (2) reached a final judgment on the merits and (3) involved the same parties or their privities.
 22 *Mypoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985 (9th Cir. 2005); *Sidhu v. Flecto Co.*, 279
 23 F.3d 896, 900 (9th Cir. 2002). Claim Preclusion bars all grounds for recovery, whether or not
 24 they were actually asserted in the previous lawsuit. *Clark v. Bear Sterns & Co., Inc.*, *supra*,
 25 966 F.2d at 1320; *In re Int'l. Nutronics, Inc. v. Robertson*, 28 F.3d 965, 969 (9th Cir. 1994).

1 “Collateral estoppel, or issue preclusion, bars the relitigation of issues actually
 2 adjudicated in a previous litigation between the same parties.” *Clark v. Bear Sterns & Co.,*
 3 *Inc., supra*, 966 F.2d at 1320; see also *Robi v. Five Platters, Inc., supra*, 838 F.2d at 322 (9th
 4 Cir. 1988). Issue preclusion prevents the re-litigation of an issue (1) identical to the one
 5 alleged in the prior litigation; (2) actually litigated in the prior litigation; and (3) actually
 6 determined as a critical and necessary part of the judgment in the earlier action.” *Clark v.*
 7 *Bear Sterns & Co., Inc., supra*, 966 F.2d at 1322.

9 Although there was no judgment in the prior action, this Court’s prior Order expressly
 10 determined that no viable claim could be asserted against CAL LAND which in effect is the
 11 equivalent of a judgment. Either doctrine thus operates as a complete bar to BARBERA’S
 12 new suit, and, thus both doctrines bar BARBERA’S claims.

14 CONCLUSION

15 For the foregoing reasons, the Court GRANTS CALIFORNIA LAND TITLE OF
 16 MARIN’S Motion to Dismiss Plaintiff PATRICIA C. BARBERA’S Complaint.

17 Dated: _____, 2008

18
 19
 20
 21 _____
 The Honorable Sandra B. Armstrong
 United States District Court Judge

22
 23 I, Daniel A. Gamer, am the ECF User whose ID and password are being used to file
 24 this [Proposed] Order.

25 _____
 /s/ Daniel A. Gamer
 Daniel A. Gamer